***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 74-2380

to be argued by KENNETH A. HOLLAND

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

v.

FORREST GERRY AND ELDEN TURCOTTE,

Appellants

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLEE

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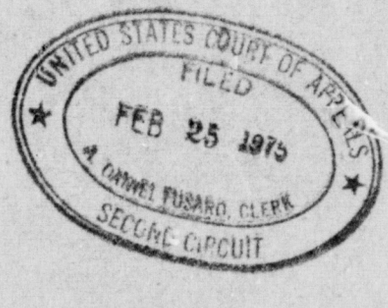


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# I N D E X

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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## ISSUES PRESENTED

1. Whether the evidence was sufficient to support the convictions.

2. Whether the trial court improperly curtailed the cross-examination of David Kraft.

3. Whether the trial court allowed the prosecution too much latitude in its cross-examination of Forrest Gerry.

4. Whether the trial court erred in denying appellant Turcotte's pretrial motion to sever.

5. Whether the trial court erred in denying a motion to dismiss Court II for lack of venue.

## STATUTES INVOLVED

18 U.S.C. §1503 reads in pertinent part:

> Whoever corruptly ... endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. §1623 reads in pertinent part:

> False declarations before grand jury or court
>
> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * *
>
> (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York (Platt, J.), defendant Turcotte was convicted of having prejured himself before a grand jury, in violation of 18 U.S.C. §1623 (Count I), and defendants Gerry and Turcotte were convicted of having attempted to obstruct justice by

endeavoring to persuade David Kraft to testify falsely before a grand jury in violation of 18 U.S.C. §1503 (Count II), and of having conspired to obstruct justice through Turcotte's perjury before a grand jury and through their endeavor to persuade Kraft to give false grand jury testimony in violation of 18 U.S.C. §371 (Count III).

Defendant Gerry was sentenced to two concurrent four-year terms of imprisonment on counts two and three, to run concurrently with a previously imposed sentence in 73 Cr. 1068, and was fined $5,000 on each count. Turcotte was sentenced to three concurrent one year and a day sentences.

1. The government's case.

The government's evidence at trial revealed that in May 1972, a special federal grand jury impanelled in the District Court for the Eastern District of New York, commenced an investigation into possible violations of 18 U.S.C. §224, the Federal Sports Bribery Statute (Tr. 65). Incident to the investigation, the grand jury focused on the New York harness racing industry in general and the superfecta races at Yonkers and Roosevelt Raceways in particular[1/] (Tr. 65).

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1/ A superfecta is a race in which a winning bettor must select the first four horses in their order of finish. The grand jury concentrated upon the superfectas because of the large amounts of money normally bet on those races (Tr. 65). Internal Revenue Service Form 1099, required to be filled out for large payoffs, provided the grand jury with objective data on the winning bettors (Tr. 65).

In attempting to determine whether there had been any fixing of the superfectas, the grand jury inquired into the ownership of harness racing horses (Tr. 67). Pursuant to this inquiry, the grand jury looked into the ownership of two race horses, "Milty Hanover" and "Adios Misty" (Tr. 105). Additionally, the grand jury sought to determine the nature of Forrest Gerry's relationship with driver-trainers, in particular driver-trainer Turcotte (Tr. 67-68).

Incident to the grand jury investigation several witnesses were called, two of whom were David Kraft and Elden Turcotte. Kraft testified before the grand jury on May 21, 1973 and again on September 10, 1973. On July 25, 1973, after Kraft was arrested for perjury in his May 21 testimony, Kraft agreed to cooperate with the government (Tr. 166). The charges in Counts II and III of the indictment referred to defendants' attempt to influence Kraft's testimony prior to his second grand jury appearance. Turcotte testified before the grand jury on September 14, 1973; portions of this testimony formed the basis of the perjury charge in Count I and constituted a partial objective of the conspiracy charge in Count III.[2/]

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2/ Mr. Ralph Wilkenson, the foreman of the grand jury testified that he administered the oath to Elden Turcotte on September 14, 1973 (Tr. 69). Pursuant to the following questions asked of Turcotte at the grand jury and the answers tendered thereto by Turcotte, the grand jury indicted Turcotte for perjury:
(footnote cont'd)

a. David Kraft, the chief government witness, had pleaded guilty to race-fixing prior to trial (Tr. 235-36).

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Q. Let me ask you this: With particular horses, how would you be involved with them as an owner, as a trainer, as a driver? Is there anything else that I'm leaving out because I'm not familiar with racing myself?

A. No.

Q. Let me ask you all three. As an owner, as a trainer, as a driver, for any horses that you were an owner of, that you drive or that you are a trainer of, is Forrest Gerry the real owner of those horses?

A. No.

Q. Do you know anything about Forrest's hidden ownership of horses, the fact that he owns horses that are listed in other people's names?

A. No.

* * *

Q. Mr. Turcotte, have you driven any horses within the last nine months that you know have belonged to Forrest Gerry?

A. That I knew belonged to Forrest Gerry?

Q. Yes.

A. No. I raced horses for a Mr. Kraft Hill Farms that I was under the impression and believe they belong to Kraft Hill Farms. From my understanding, just rumors going around, I don't know if there's any truth to it, that Forrest Gerry was the agent on these horses that they were bought by him for Kraft Hill Farms. The horses were sent to me registered for Kraft Hill Farms. The money that these horses

Kraft first met Gerry in February, 1973 (Tr. 145). Thereafter, Gerry would fix the superfecta races at Yonkers and Roosevelt Raceways in New York and telephone the information to Kraft (Tr. 148-49). Kraft admitted that he won substantial sums of money for two months during this betting arrangement with Gerry (Tr. 149). Subsequent to April 7, 1973, Kraft no longer bet with Gerry (Tr. 254). The trial court specifically instructed the jury that neither Turcotte nor Gerry were on trial for race-fixing (Tr. 149).

Kraft testified that Forrest Gerry had approached him in July 1973 with a story which Kraft should tell to the grand jury relative to the superfecta betting scheme, and that both Gerry and Turcotte had approached Kraft with a story which Kraft should relate to the grand jury with respect to the ownership of two horses, "Milty Hanover" and "Adios Misty" (Tr. 170, 180-86).

In March 1973, Gerry approached Kraft and requested his permission to put some horses in the name

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> earned was sent to Kraft Hill Farms. The claim check, when it was claimed, went to Kraft Hill Farms and Kraft Hill Farms, as far as I'm concerned, still owes me the money. Now, as far as Forrest Gerry owning the horses, not to my knowledge.
>
> Q. Kraft Hill Farms, who would be the owner there?
>
> A. I think it's two boys. Their sons or Dave Kraft.

of Kraft Hill Farms.[3/] Gerry said he wanted to pass the horses through that way for resale. Since Gerry was unlicensed, he could not register a race horse in his own name. Kraft acquiesced and stated to Gerry: "Go ahead. Just as long as you're going to sell some horses its O.K. No problem" (Tr. 151).

Thereafter, between April 12, 1973 and August 14, 1973, several checks were sent to Kraft Hill Farm from Roosevelt and Saratoga Raceways in New York, the checks constituting purse winnings of "Milty Hanover" and "Adios Misty" (Tr. 248-51).[4/] After receipt of the initial check on April 12, 1973, Kraft became aware that Gerry had not resold the horses, and that horses racing under the name of Kraft Hill did not belong to Kraft Hill Farm (Tr. 154-156). Approximately one week after receipt of this first check, Kraft contacted Gerry about getting the horses out of Kraft Hill's name (Tr. 155). Kraft was afraid that the hidden ownership might adversely affect his sons' licenses to own horses (Tr. 158).

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3/ Kraft Hill Farms is a corporation, the initial capitalization constituting a transfer of racing horses originally owned by David Kraft to his two sons (Tr. 150-52). David Kraft's license to own horses had been revoked (Tr. 153). Terry Kraft is the president of Kraft Hill Farms (Tr. 176).

4/ On cross-examination, David Kraft testified that several checks were received and that the total purse winnings came to approximately $11,000 (Tr. 248-51).

On July 21, 1973, Gerry met with Kraft (Tr. 160). Gerry informed Kraft that he knew that Kraft had been before the grand jury and knew that he, Kraft, had retained a lawyer (Tr. 160-61). Gerry told Kraft that he was the only one who could hurt him in this investigation that was then beginning (Tr. 160-61). Kraft complained to Gerry that the horses were still in Kraft Hill's name. Gerry responded that Turcotte had the registration papers and on the next visit Gerry would bring the papers to Kraft so that the horses might be transferred to Turcotte (Tr. 166).

On August 4, 1973, Gerry again met with Kraft at Kraft's residence in New Jersey (Tr. 167). This conversation, with the consent of Kraft, was recorded by the Federal Bureau of Investigation (Tr. 168).[5/] Gerry told Kraft that "we have to say about this betting scheme that I handicapped some horses and you went to OTB and bet the horses for me because I wasn't able to get there" (Tr. 170). Gerry then stated, "that will be boxing them or putting them all together at a later date, this should take care of the extra few tickets that you said you cashed. If you say it that way, that will cover everything up" (Tr. 170). Kraft testified that Gerry told him to say this to the grand jury (Tr. 170).

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5/ Tapes of this conversation and subsequent conversations, on August 19 and 30 were introduced into evidence and played before the jury. The tapes were introduced as government's exhibits 4, 5 and 6 (Tr. 509-12).

At this August 4, meeting Gerry brought the registration papers for "Milty Hanover" and "Adios Misty" (Tr. 172). Gerry told Kraft to put the name of Elden Turcotte on the registration forms, Gerry first being required to spell the name of Elden Turcotte for Kraft, but then Gerry changed his mind and said, "No. Don't put anything in there and leave the dates blank. I'll put the names in there" (Tr. 173). Kraft's son, Terry Kraft, signed the registration papers in blank on behalf of Kraft Hill. Kraft assumed that Gerry would "send them on to normal registration and get them turned over to whoever he would sell them to" (Tr. 173).

Thereafter, on August 19, 1973, Gerry and Turcotte appeared at Kraft's residence in New Jersey (Tr. 179-81). The conversation was recorded with Kraft's permission by the FBI (Tr. 180). Gerry introduced Turcotte to Kraft. This was the first time the two had met. Gerry explained that if the investigation continued, Turcotte must be able to recognize Kraft (Tr. 180). After Gerry told Kraft "we want to discuss a story," Turcotte presented a fabricated story about how Turcotte had received the two horses from Kraft and how the two horses were eventually sold (Tr. 181-83). Kraft testified that Turcotte told him this story so as to coordinate their statements "to the grand jury, or to the FBI or any agency I am involved with regarding the ownership of the horses that Mr. Turcotte has in his

possession ..." (Tr. 181). Turcotte remarked that they had to get the story straight on how they met (Tr. 181). Was it at the Freehold Raceway or did you have a friend that saw me race and told you about me (Tr. 182)? Turcotte continued to elaborate. Kraft had purchased the horses for $21,000 and then decided to sell the horses to Turcotte for $15,000 (Tr. 182-83). Turcotte did not have the money to purchase the horses and Turcotte went out and found a buyer, but in the interim one of the horses had been claimed for $10,000 (Tr. 182). Turcotte tells Kraft that the other horse was sold to a friend of his for $5,000 (Tr. 182). Turcotte then states, "Now, I got the cash and where did I give you the cash? I don't know. Maybe I gave it to you in Freehold at the racetrack or Roosevelt or maybe here. You say where you want me to say I gave you the cash" (Tr. 182). Turcotte further states, "you've got to say you raced these horses with me and this is the story we have to get together on" (Tr. 183).

During this conversation of August 19, 1973, Turcotte told Kraft that he (Turcotte) had taken the two horses on a 55-45 percentage; 55 per cent of the purses going to himself and 45 per cent going to Gerry (Tr. 197). During this meeting, Turcotte brought a check to Kraft for $10,000, and Kraft testified that Gerry and Turcotte stated "sign this check so we can get it cashed" (Tr. 185). Kraft refused to sign the check. Gerry then stated "It's okay,

he's good for the money, he'll pay us. Take the check" (Tr. 185). Kraft testified that the check was left with him to be deposited, and Gerry and Turcotte would return to receive the $10,000 (Tr. 185).

Thereupon, Gerry suggested to Turcotte that he leave the room because "Dave Kraft and I have something to talk about" (Tr. 186). After Turcotte left the room, Gerry told Kraft that he couldn't get in any trouble over the superfecta investigation,[6/] and if Kraft would just tell "them" that he had purchased the horses for $21,000 and

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6/ On cross-examination, Gerry testified that he remembered discussing with Kraft the superfectas:

> Q. To the best of your recollection, did you discuss the relationship that you had with Mr. Kraft concerning betting the Superfecta?
>
> A. I imagine that is what we talked about. You have the tape, you know exactly what the conversation was.
>
> Q. Now, do you remember saying this or, excuse me, David Kraft saying to you: "Well, I just -- I, I know I didn't talk to any drivers -- it was leaked back that they had a driver in their pocket, they, they had a driver that could point you out.
>
> Do you remember him say that, sir?
>
> A. Something to that effect.
>
> Q. Do you remember saying this, you yourself: 'Couldn't implicate you anyway because at any time which you say that I would like a horse

(footnote cont'd)

that they were owned by Kraft Hill Farm, there wouldn't be any problem (Tr. 186).[7/]

On August 30, 1973, another meeting between Kraft and Gerry occurred at Kraft's residence in New Jersey. The conversation which took place was recorded by the FBI with Kraft's permission (Tr. 188). Kraft testified that Gerry

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> you would like a horse and we handicapped it and we left out two horses and we put horses in. I mean that's right. I mean sometimes we lost sometimes we won sometimes we lost. What we have got to say is sometimes I did have you bet something for me if I liked horses I'd say box them three times for me -- some nights you'd say to me well I like these I can't get to OTB, you box these horses for me, that'll cover our song any time that there was some tickets that you and your man cashed at the one or two in between of somebody else, all right? Do you understand what I --'
>
> Do you remember saying that?
>
> A. Yes, I do. [Tr. 1020-21]

7/ On cross-examination, Kraft testified that he was not sure that Turcotte, during the August 19, 1973 meeting with Kraft, used the term "grand jury", but was sure that Gerry and Turcotte were talking about some investigative agencies (Tr. 342). Kraft testified that Gerry knew that he had been arrested for perjury (Tr. 344). Kraft additionally informed Gerry that he had been down there and "they" questioned me (Tr. 344). Kraft was not sure whether Turcotte ever knew that he had been arrested for perjury (Tr. 344). Kraft further testified that Gerry knew that the investigation was a federal investigation, and that there was no investigation in New Jersey (Tr. 422).

came back for the $10,000 check (Tr. 189). Kraft told Gerry that he couldn't give him the money because the government had seized Kraft's books and papers (Tr. 189). Kraft then told Gerry that he had told the federal government everything there was to know (Tr. 190). Gerry responded, "good, tell them the truth, don't forget and tell them the truth" (Tr. 190). Gerry asked Kraft if he had told them about the horses and Kraft responded affirmatively (Tr. 197). Gerry asked him why he did that and Kraft stated, "because they are your horses" (Tr. 191). Gerry responded, "wholly mackeral, I told you to tell them about -- tell them you own them damned horses and there wouldn't be no trouble" (Tr. 191).

Thereafter, late on the night of September 7, 1973, Turcotte appeared at Kraft's residence. Turcotte wanted $5,500 due him from the horses and Kraft told him to see Gerry since he, Kraft, had never hired him (Tr. 192).[8/]

On cross-examination Kraft admitted that he and Gerry were involved in a superfecta conspiracy which centered on superfecta betting and hidden ownership of the two horses (Tr. 423). Gerry was intent about concealing his

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8/ Kraft testified that Kraft Hill Farms had received approximately eleven checks constituting the purse money on the two horses (Tr. 248-52). All checks were deposited in the Kraft Hill account, in addition to which was deposited a $10,000 claiming check on "Milty Hanover" brought to Kraft by Turcotte on August 19, 1973 (Tr. 349-50). Kraft (footnote cont'd)

ownership of the two horses, because the horses gave Gerry "his connection to the Canadian drivers through Elden Turcotte and this is why he had horses with Elden Turcotte. Elden Turcotte could get to the Canadian drivers" (Tr. 424).

b. The government also presented evidence relative to the registration of horses and the licensing of owners. Files of the United States Trotting Association (hereinafter, the USTA) revealed that "Adios Misty" and "Milty Hanover" were purchased by Kraft Hill Farms on April 5, 1973 from Thomas Perkins and Stephanie Coney. On August 14, 1973, "Adios Misty" was sold by Kraft to one Nicholas Lombardo and "Milty Hanover" was claimed for $10,000 by one Louis Martinez (Tr. 695-98, 701-02). Elden Turcotte requested by letter that the transfer of ownership for the two horses be sent to him at his White Plains, New York address (Tr. 699, 720-21). The USTA complied with Turcotte's request (Tr. 721).

Gerry was not licensed as a trainer-driver in 1973 and had not applied for a license to train, drive, or own horses since 1967 or 1968 (Tr. 656). However, an unlicensed party can act as a broker between two people who are licensed (Tr. 672-73).

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testified that on August 30, 1973, Gerry asked him for the $10,000 claim money and the purse winnings, the entire amount totalling $21,613 (Tr. 576). Kraft further testified that a check totalling $21,613 was turned over to Forrest Gerry (Tr. 349); the date of the check being March 14, 1974.

Eligibility papers are kept on each horse participating in a race and, in the event a horse is inserted in a claiming race, both the eligibility sheet and an additional claim authorization, signed by the owner, are to be filled out and submitted (Tr. 734, 739). Eligibility papers for "Adios Misty" and "Milty Hanover" revealed that both had raced at Roosevelt Raceway (Tr. 737). Turcotte had signed the claim authorization form on March 9, 1973, inserting "Milty Hanover" in a claiming race (Tr. 740). On May 12, 1973, Turcotte signed the authorization to enter "Adios Misty" in a claiming race (Tr. 740). However, it was a common practice for trainers to fill out these forms (Tr. 742); although before a horse is entered in a claiming race, the owner would ordinarily know about it (Tr. 790-91).

c. The government also adduced evidence relative to Gerry's superfecta betting. James Murphy testified that he knew Gerry for approximately six to seven years and had purchased superfecta tickets for Gerry (Tr. 800-01). In August of 1973, Gerry told Murphy that if the FBI came to him relative to the superfecta betting, Murphy should tell them that he never purchased tickets for Gerry (Tr. 802). Gerry also told Murphy that at one time he used to own "Milty Hanover" (Tr. 803).

2. The defense case.

The principal defense witness was Forrest Gerry. Gerry explained that David Kraft had purchased two horses,

"Mosaic" and "Chieftain", from a John McCardle in New Zealand (Tr. 939). "Chieftain" was purchased for $25,000 and "Mosaic" for $10,000 (Tr. 940). Shortly after purchase, "Chieftain" died (Tr. 940). Kraft had insured the dead horse for $25,000. "Mosaic" was racing poorly and Kraft wanted to exchange this horse with McCardle for another horse (Tr. 940). Gerry made an effort, on behalf of Kraft, to get McCardle to trade a horse for Mosaic; however, no trade came about (Tr. 941). Kraft told Gerry that when he got the proceeds from the insurance he wanted to buy one or two horses, and if Gerry saw any for sale to notify Kraft (Tr. 941).

Thereafter, Gerry became aware of two horses that were for sale, "Milty Hanover" and "Adios Misty" (Tr. 942). Gerry informed Kraft of the availability of the two horses. Kraft was interested but he didn't want to purchase the horses until the insurance proceeds on "Chieftain" arrived (Tr. 943). Gerry agreed to purchase the two horses for Kraft at a price of $21,000 (Tr. 943). Kraft was to reimburse Gerry when the insurance proceeds became available (Tr. 943).[9/] However, on direct examination Gerry in the

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9/ David Kraft, on cross-examination, had testified that he had a horse by the name of "Chief Attain" and it was insured for $25,000 by Lloyds of London (Tr. 426). Kraft insisted that the insurance proceeds from "Chief Attain" were never promised to Gerry for Gerry's purchase of "Milty Hanover" and "Adios Misty" (Tr. 426-27).

following colloquy referred to the two horses as his own (Tr. 944):

> Q. At which point did your horses, either one of them, start to win?
>
> A. Milty Hanover, that horse started to win money. In fact, from that day I bought him he has won over $50,000.

Gerry testified that the horses were purchased from Ray Allen,[10/] the previous driver-trainer, and sent to Elden Turcotte at Roosevelt Raceway (Tr. 943). Gerry told Turcotte that Kraft wanted Turcotte to train and race the horses and arranged that Turcotte would receive 55% of the purses and Kraft 45% (Tr. 944). Gerry and Kraft conversed almost daily on the telephone about the superfecta case; at the end of July, Kraft told Gerry that he had been arrested (Tr. 945). Kraft then indicated to Gerry that he wanted Turcotte to meet with Kraft to get a story straight about the two horses, so that his sons' licenses would be protected if, and when, the New Jersey Racing Commission checked with his sons about the horses (Tr. 945).

Gerry further testified that he was not aware in either July or August that Kraft would reappear before the grand jury (Tr. 946). Gerry additionally testified that he

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10/ On cross-examination Gerry testified that he dealt with a Ray Ireland, the driver-trainer of "Milty Hanover" and "Adios Misty", when he purchased the horses for David Kraft (Tr. 963-64).

never asked for the purse winnings of the two horses (Tr. 946a), and never told Turcotte that he had purchased the horses for Kraft (Tr. 951).

On cross-examination Gerry admitted that he was a partner with Kraft in a superfecta betting arrangement (Tr. 954). He remembered discussing some tickets on August 4, 1973 with Kraft but did not remember the full extent of the conversation (Tr. 981).[11/] On August 4, 1973, Gerry knew that Kraft had been arrested for perjury before the grand jury, that his own name had been brought up in the grand jury investigation of the superfectas, and that the FBI was acting as investigator for the grand jury in which Kraft was called (Tr. 983, 988). He remembered Kraft asking on August 4, "Is he ["Milty Hanover"] claimed or I thought you were going to keep him in condition," and himself responding, "I was going to but, uh, good race today (Tr. 1006-1007).

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11/ Kraft's testimony revealed that on August 4, 1973, Gerry told him that in previous years he became involved with the twin doubles and got trapped because he had associated with all the "fellows" together (Tr. 171). Kraft testified that Gerry told him that this wouldn't happen again because the fellows he fixed (the drivers at the race tracks), for instance A, B & C, were told not to see each other, and Gerry would take messages back and forth between them (Tr. 171-72). On cross-examination, Gerry testified he remembered making these comments at the August 4, meeting with Kraft (Tr. 992-93).

Gerry recalled Kraft telling him on August 30, 1973, that Kraft's books had been subpoenaed (Tr. 1024). He also remembered discussing with Kraft the subject of grand juries (Tr. 1025).[12/]

Forrest Gerry called two additional witnesses, Joseph Pullman and Agent Arthur Walsh of the Federal Bureau of Investigation. Pullman testified that he had a conversation with Kraft in which Kraft told him that he had purchased two horses from the money he got from "Chief Attain" (Tr. 891). He also recalled Kraft stating on

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12/ Q. At that time on the 30th did you ever discuss Grand Juries with Mr. Kraft?

A. Not to my knowledge.

Q. Not to your knowledge? Would it refresh your recollection if I read to you:

> 'Dave, I've been through more grand juries -- if you go for the next year you won't be to as many as I was. For two straight years I went every week -- every -- twice a week. Tuesday and Friday, every day. Some days I just sat there all day long. Other times they'd tell me to come in -- then they'd all they'd do is come up to me on Tuesday and say come back Friday. Friday they'd say come back Tuesday.'

Do you remember your saying that sir?

A. Yes, I do. [Tr. 1024-25]

April 19, 1973, that Gerry had "everything to worry about" (Tr. 904). Agent Walsh testified that on April 19, 1973, at the prosecutor's office, he heard someone tell Kraft "don't worry" (Tr. 927).

Elden Turcotte called Joseph M. Fanning, a special agent for the FBI who had prepared the affidavit in support of an arrest warrant for David Kraft on July 25, 1973 (Tr. 854). Fanning testified that on July 25, 1973, he had a conversation with Kraft wherein Kraft told him that Gerry had purchased several horses and requested permission of Kraft to put the horses in Kraft Hill Farms' name (Tr. 862).

## ARGUMENT

### I

### THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS

#### A. The Evidence Was Sufficient To Support The Obstruction Of Justice Convictions Under Count II

Viewing the evidence in the light most favorable to the jury verdict, Glasser v. United States, 315 U.S. 60, 80 (1942), there was clearly sufficient evidence for the jury to find that Gerry and Turcotte corruptly endeavored to influence the testimony of David Kraft before the grand jury in violation of 18 U.S.C. §1503.[13/] See Knight v. United

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13/ To support a conviction for corruptly endeavoring to obstruct the due administration of justice by endeavoring to influence the testimony of a grand jury witness, the acts charged -- that appellants sought to influence David Kraft's (footnote cont'd)

States, 310 F.2d 305 (5th Cir. 1962), United States v. Bufalino, 285 F.2d 408 (2nd Cir. 1960), ~~Broadbent~~ Odom v. United States, 116 F.2d 996 (5th Cir. 1941), reversed on other grounds 313 U.S. 544 (1941).

In making a determination as to whether there was sufficient evidence for the jury to find that appellants knew or should have known that David Kraft would testify at the grand jury subsequent to May 21, 1973, the date of his first grand jury appearance, it is axiomatic that both direct and circumstantial evidence may be considered, United States v. Bufalino, 285 F.2d 408 (2nd Cir. 1960), and additionally that the requisite scienter may be inferred from the body of evidence as a whole, Knight v. United States, 310 F.2d 305 (5th Cir. 1962).

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testimony on the superfecta betting arrangement and the hidden ownership of "Milty Hanover" and "Adios Misty" must -- bear some reasonable relationship to the subject of the grand jury investigation. United States v. Ryan, 455 F.2d 728, 734-35 (9th Cir. 1972), citing to United States v. Siegel, 152 F. Supp. 390 (S.D.N.Y. 1957), affirmed 263 F.2d 530 (2nd Cir. 1959), cert. den., 359 U.S. 1012 (1959). Herein, the undisputed testimony of Ralph Wilkinson, the foreman of the grand jury, established that the grand jury was investigating the superfecta betting, the ownership of harness racing horses, and the relationship of Forrest Gerry with driver-trainers, and in particular Elden Turcotte (Tr. 65-68, 105). The effort put forth on the part of Turcotte and Gerry to induce Kraft's false testimony before the grand jury on the hidden ownership of the horses, plus Gerry's endeavor to get Kraft to testify falsely on the superfectas, bore a reasonable relationship to the grand jury investigation.

Herein, the grand jury was convened in May 1972, and was investigating the entire harness racing industry. Between May 21, 1973 and August 30, 1973, the dates set forth in the instant indictment charging appellants with endeavoring to obstruct justice, the grand jury investigation was ongoing and Forrest Gerry was aware that his name had been brought up in that proceeding. The tape transcripts reflect that there were extensive discussions between Kraft and Gerry about the instant grand jury investigation and Turcotte's statements to Kraft on August 19, clearly could be inferred by the jury to have been made in anticipation of an appearance before investigative agencies, including the grand jury.[14/]

This Court, in United States v. Bradwell, 388 F.2d 619 (2nd Cir. 1968), held that it is appropriate for the government to establish a motive by connecting the defendants who are charged with endeavoring to obstruct justice by influencing the testimony of a grand jury witness, with the objects of the grand jury investigation. Accord,

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14/ Accordingly, appellants' reliance on United States v. Bufalino, supra, 285 F.2d 408 (2nd Cir., 1960) is misplaced. There, this Court held that there was no evidence either direct or circumstantial, for the jury to reasonably infer that appellants had conspired to obstruct justice or that they could reasonably have foreseen that they would be testifying before a grand jury.

United States v. Knohl, 379 F.2d 427, 438-39 (2nd Cir. 1967), cert. den., 389 U.S. 973 (1967). Here, it is important, if not critical, to understand the reasons behind defendants' endeavor to get Kraft to testify falsely before the grand jury.

David Kraft was involved with Gerry in a betting arrangement whereby Gerry would fix the superfecta races and phone the information to Kraft (Tr. 148-49). During this relationship Gerry approached Kraft and requested permission to run through some horses in the name of Kraft Hill Farms for the purposes of resale (Tr. 151). Kraft acquiesced in March 1973, but later discovered that the horses, "Milty Hanover" and "Adios Misty", horses which did not belong to him, were racing under the name of Kraft Hill Farms (Tr. 156). Kraft contacted Gerry and requested that he take the horses out of Kraft Hill's name (Tr. 155).

Thereafter, in a conversation on July 21, 1973, Gerry informed Kraft that he knew that Kraft had appeared before the grand jury and that Kraft had retained a lawyer (Tr. 160-61), and that Kraft was the only one who could hurt him in this investigation that was then beginning (Tr. 160-61).

On August 4, 1973, Kraft again met with Gerry. The conversation which ensued was recorded, with Kraft's permission, by the FBI. At this meeting, Gerry told Kraft "we have to say about this betting scheme" that I handicapped

some horses and you bet them for me, and this will take care of the extra few tickets that you said you cashed (Tr. 170). Gerry informed Kraft that this would cover everything up (Tr. 170).

The transcript of the August 4, conversation reveals that Gerry knew that Kraft had been subpoenaed (Gerry's App. 68, hereinafter A.). The transcript further reveals that Kraft and Gerry extensively discussed grand juries, both the present grand jury investigation and previous grand juries which Gerry had appeared at (A. 72-74, 78, 82, 84-85). They extensively discussed the superfecta investigation, the individuals involved in the betting scheme, and the lawyer retained by Kraft (A. ~~24, 31-34~~ 76-77, 92-93). Kraft states that "Maybe I'll bring up ..." (A. ~~23~~ 87), and Gerry responds, "How uh will anybody can call you. What can be, what can be covered. I mean uh like you, you made a foolish mistake that your gonna answer the first question and get yourself arrested for perjury" (A. ~~23~~ 87).

During this August 4, conversation, Kraft and Gerry discussed the horses "Milty Hanover" and "Adios Misty" (Tr. 172-74). Gerry brought the registration papers for the two horses and had Terry Kraft sign them, in blank, so that the horses could be transferred out of Kraft Hill's name (Tr. 172-74). Kraft assumed that this would be the end of it, and that Gerry would take the horses and run them through normal registration (Tr. 173). The transcript of the tape

clearly evidences that Gerry was intimately acquainted with the racing performance of "Milty Hanover", so much so that the jury could infer that the horses in fact belonged to Gerry and not Kraft.[15/] On cross-examination, Kraft testified

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15/ FG: Oh! That horse "Miltie (sic) Hanover" horse won two while I was in Puerto Rico.

DK: I know, I know one he won.

FG: He's won two. He paid 15 and then paid 11 or 12. Win 2, 4.

DK: What, what size claim was he in?

FG: I mean that was for $7,500. Now he's put him up to 10, to 10.

DK: 24 he's gonna lose 7,500.....is he claimed or I thought you were going to keep him in condition races

FG: I was going to but, uh, good race today.

DK: Tonight.

FG: It's going this afternoon.

DK: It's an afternoon race....said she'd be fourth of fifth

FG: You should have seen this horse....she made a couple of breaks and then.... but her heart was in it or not he said he's been working on it now she ain't making breaks no more so he said we're going to.... 'cause she tore all the other muscles.

DK: Oh, I know.....

FG: So I got them papers and all you have to do is just have them sign and just change them over to him

DK: What does he want in his name? What's

(footnote cont'd)

that Gerry told him that he had the horses with Elden Turcotte because this gave him the connection to the Canadian drivers (Tr. 424).

Thereafter, on August 19, 1973, both Gerry and Turcotte appear at the residence of David Kraft. Gerry and Turcotte present a story to him which he should relate to the grand jury, FBI or any investigative agency which Kraft would be involved with (Tr. 181).[16/] The story was clearly designed to suggest that Kraft had purchased the horses and had retained Turcotte to drive and train them on a 55-45 percentage (A. 112, 113-118, 120-121, 123, 129-132). Appellants argue that the story was intended for the New Jersey Harness Racing Commission, and that David Kraft had requested

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his first name? I don't what the hell

FG: ELDEN

DK: ELDEN like ELDEN HARNESS---I'll just put "E". I'll get TERRY to sign this for me

FG: You have to do nothing. All you have to do is to have him sign it. Then let ELDEN sign (A. 107-108).

16/ Appellants rely on Kraft's cross-examination testimony to the effect that he could not remember whether Forrest Gerry or Elden Turcotte, during the August 19, 1973, conversation, used the word grand jury (Tr. 341-43). Kraft's testimony did reveal, however, that the story was intended for some investigative agencies (Tr. 341-43), and this testimony is not inconsistent with Kraft's testimony on direct examination that "Mr. Turcotte begins to tell me a story of what we should say to the grand jury or to the FBI or any agency I am involved with regarding the ownership of the horses that Mr. Turcotte has in his possession...." (Tr. 181).

Turcotte's presence on August 19, to get the story straight for this Commission. David Kraft testified that he did not know that Turcotte was coming on the 19th, and additionally thought that when Gerry brought the registration papers for "Adios Misty" and "Milty Hanover" on August 4, that Gerry would send them on to normal registration and that would be the end of it (Tr. 173). While the appellants suggest that the story was intended for the New Jersey Commission, there is no evidence, other than the testimony of Forrest Gerry, which remotely suggests that this story was intended for such a purpose.

Appellant Gerry suggests that he did not know that Kraft would reappear at the grand jury since he knew that Kraft had been arrested for perjury before the grand jury on May 21, 1973. The transcript of the tape recording of August 19, 1973, clearly suggests the reverse. Gerry was concerned that the charge of perjury was a phony charge against Kraft, but that "they" would use the leverage of the felony charge to get Kraft to say something against Gerry, because "they" think that Kraft was with Gerry when Gerry talked to some of the drivers (A. 151).

Additionally, Elden Turcotte, during the August 19 conversation with Kraft and Gerry, states that "if they would have called me up before and say, they haven't called me or anything, but if they ever did, oh, they stood five people up there ... I wouldn't know if I met you before"

(A. 117). Elden Turcotte additionally asks, "I know you" (A. 121). Gerry responds "Yeah" (A. 121). Turcotte then states, "Ah, as a matter of fact the things you, oh, you did happen to mention something, but I didn't think that I know you got a lot of horses here. I don't not really sure I think he said, oh, Forrest, had, had something to do with it. But I heard somebody say it in the paddocks that's all. But I'm not all I know is I don't have any of the horses.... The man called me" (A. 121).

Midway through this August 19, meeting Turcotte left the room. Kraft and Gerry continue their discussion relative to the superfecta investigation. Gerry is concerned that Kraft might be bargaining for immunity (A. 135). Kraft and Gerry then discuss whether Gerry was concerned that "they" might have a driver in their hip pocket. Kraft asks Gerry if he, Gerry, has any horses in Bonacorsa's barn and Gerry responds that he didn't, and then indicates to Kraft that there were guys going in and testifying that he, Gerry, had some link with Bonacorsa and they put two and two together. 17/

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17/ DK You got horses in Bonacorsa's, ah, Bonacorsa's barn

FG There's no horses, let me tell you, Bonacorsa claimed four or five horses and it was my idea that he claim them. But it was for this guy in Chicago, this guy that I used to have horses for in Chicago....and he was seeing how much better horses they was here for the price than they are in Chicago,

(footnote cont'd)

Kraft testified that Gerry told him on August 19, 1973, that if he, Kraft, would just tell them that he had purchased the two horses for $21,000 and that they were owned by Kraft Hill Farms, there wouldn't be any problem (Tr. 186).

Thereafter, on August 30, 1973, Gerry again visits Kraft at his residence. Kraft testified that Gerry came back for the claiming money (Tr. 186).[18/] Kraft informed Gerry

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> So he said I'd like to claim some horses here and take them back to Chicago with me. And I said well the only way you can is, you got to claim them, they got to stay here for 30 days and race 'em then ship 'em back. So Bonacorse was there and he made a deal with Bonacorsa. Bonacorsa claimed him "Jet Butler" and four or five other horses for him, him putting up the money, Bonacrosa racing 'em here for a month or so and then ship 'em to Chicago to there was, went in testified and then called Bonacrosa and where was he getting the money to buy these horses and they had an idea that these horses he was getting was mine
>
> DK inaudible
>
> FG Yeah, but they was not my horses... other than I did talk with his kid and talked with Bonacorsa and I'd say well "Jet Butler's" (sic) a good claim or this horse is a good claim (A. 155-56).

18/ K- Meantime, I can figure out what you can do with them. Maybe you can figure out what you're gonna do with them. That's what you gotta do.

G- Now it's too late, to do anything with them. If I had the money, all the

that he had told the government everything including the story about the two horses (Tr. 190), to which Gerry responded, "Wholly mackeral, I told you to tell them about -- tell them you own them damned horses and there wouldn't be no trouble (Tr. 191).[19/] There is no question but that the grand jury

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money that the horses earned ...

K- It's in the account, every ...

G- Well, you told me, the other day on the telephone, that you didn't deposit the check until Friday

K- That's right.

G- Well, according to Franklin National Bank, the check cleared the day before that, on the 23rd, on Thursday.

K- Well, I deposited it on Friday.

G- I don't know how they would have cleared it the day before that. I don't care what bank you check from now on, just tell me what the raceway's got down. The raceways got the check as clear. So that's all I know (Tr. 188-89).

19/ G- Did you tell them that you didn't purchase the horses?

K- That's right.

G- Well, I don't think you should do that

K- You don't think I should do that? Why? Huh? Why? There no way for me to substantiate that. You've got books that say, where did ya buy that, where did ya buy anything. I'm trying to tell ya that an you say to me, you sit

(footnote cont'd)

was investigating the superfectas and the hidden ownership of harness racing horses. The August 19, conversation between Gerry, Turcotte and Kraft reveals Gerry and Turcotte are trying to get a story straight on how each met the other (A. 118, 121); clearly a critical component of any story intended to conceal relationship under investigation by the grand jury

The government submits that the testimony of David Kraft alone was sufficient to warrant the jury in finding that appellants endeavored to influence his testimony before the grand jury. The jury was warranted in finding that the story was intended for the grand jury, FBI or any investigative agency which Kraft might be involved with, and the testimony of Forrest Gerry that the story was intended for the New Jersey Harness Racing Commission was considered by the jury and properly rejected. Cf. United States v. Bufalino, supra, 285 F.2d 408 (2nd Cir. 1960).

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there, I told ya go get yourself a bar examination

G- God dammit, I know right then, if you'd a just said, I purchased the horses an I paid 21,000, there'd been no problem with it, there'd been no problem ...

K- I told them, I told them the truth, I wasn't lying (A. 187).

B. The Evidence Was Sufficient To Support The Conspiracy Conviction Under Count III.

It is axiomatic that the essence of the crime of conspiracy is the agreement and not the commission of the objective substantive crime, United States v. Rabinowich, 238 U.S. 78, 87-90 (1915), and evidence of the same intent or knowledge is required to convict conspirators as to convict those charged with the substantive offense. United States v. Bufalino, supra, 285 F.2d 408 (2nd Cir. 1960). The existence of a criminal conspiracy need not be proven by direct evidence, a common plan may be inferred from circumstantial evidence, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Cassino, 467 F.2d 610 (2nd Cir. 1972), cert. den., 410 U.S. 928 (1973). With these principles in mind, an examination of the record reveals sufficient evidence for the jury to find that appellants conspired to obstruct justice through Turcotte's perjury and through their attempts to suborn Kraft's perjury.

Both Turcotte and Gerry foresaw, or should have foreseen, that David Kraft would appear before the grand jury sometime after May 21, 1973 (see Argument I.A., supra); and they agreed to corruptly endeavor to influence Kraft's testimony.

On August 19, Gerry and Turcotte appear at Kraft's residence. Kraft listens to a story propounded by Turcotte, and amplified by Gerry, relative to Kraft's acquisition and disposal of two horses, "Milty Hanover" and "Adios Misty".

As part of the story, and appellants do not quarrel with the government's contention that a story was being created, Gerry purportedly acted as the agent for Kraft in the purchase of the horses and Turcotte agreed to train and drive the horses on 55-45 percentage; 55% of the purse money going to Turcotte as the driver (Tr. 112, 122).

Kraft testified that he had never met Turcotte prior to August 19, and never contacted him prior to this initial confrontation (Tr. 181). Kraft testified that Gerry and Turcotte presented this story to him for presentation to the grand jury, FBI or any investigative agency which Kraft might be involved with (Tr. 181). On cross-examination Gerry testified he knew of no contacts between Kraft and Turcotte prior to August 19, yet Elden Turcotte, during the August 19 meeting, suggests to Kraft he said that they met at the Freehold raceway (A. 117).

The transcript of the August 19 conversation clearly reflects that Turcotte and Gerry are concerned with getting a story straight on the two horses. Turcotte then relates to Kraft how he had disposed of the horses, the purchase price of the two horses and whom the horses were sold to. Kraft knew virtually nothing about this entire transaction. The story was intended to reiteration to the grand jury, and Kraft so testified.

Based upon this evidence, the jury could reasonably infer that Turcotte and Gerry combined in a common plan to get David Kraft to testify falsely at the grand jury

relative to the hidden ownership of the two horses, thereby concealing the relationship between Turcotte and Gerry. The August 19 conversation reflects this unified plan.

Appellant Turcotte suggests that he was nothing more than an unwitting victim of a horse-owning scheme he knew nothing about. The record reflects otherwise. As this Court noted in United States v. Calabro, 449 F.2d 885, 890 (2nd Cir. 1971), cert. den., 405 U.S. 928 (1972):

> It is true that almost every aspect of Calabro's conduct is susceptible of an inference other than his participation in the conspiracy. However, as Judge Friendly observed in United States v. Geaney, supra, 417 U.S. F.2d at 1121, 'Pieces of evidence must be viewed not in isolation but in conjunction.' A seemingly innocent act, when viewed in the context of surrounding circumstances, may justify an inference of complicity.

Turcotte argues in his brief (p. 20), that both Kraft and Gerry agreed that Turcotte's primary purpose in visiting Kraft on August 19, 1973, was to obtain his share of the purse winnings and to turn over to Kraft the proceeds of the sale of the horses since he believed Kraft to be the owner of the horses. The record reflects, however, that the primary purpose of the visit was to get a story straight on how Kraft had purchased the horses and how the horses were eventually disposed of (A. 112-135).

In conjunction with this purpose, and in furtherance of the plan involving the fabricated story relative to the ownership of the horses, the $10,000 claim check for "Milty

Hanover" and the money constituting the purported purchase of "Adios Misty" ($5,000) were discussed. The August 19 transcript reflects that Turcotte was concerned with getting his share of the money and does not state in so many words that Turcotte knew that Kraft was the owner of the two horses. However, the transcript does reveal that Forrest Gerry was concerned with how Kraft was going to cash the claim check (A. 124-126). At one point in the conversation Gerry states:

> Well wait, it doesn't make no difference, he could take it if Gerry signed it he could take and get it cashed in the Mutuals. But if you ever have him take it and put it through his bank, then he just hands you the check that's good enough for me. You can put it through .... Get it cashed right away. [A. 126]

Additionally, Turcotte discusses with Kraft the purchase price of the mare "Adios Misty", and Turcotte states that he was sold for $5,000 and then states, "Well, let's get something straight in the first place where did I give you the money? Just in case, oh, I want everything else seems to be covered" (A. 123). Turcotte subsequently states, "No, but I brought that five thousand to offer that the guy give me, I gave it to you this morning" (A. 124). Nowhere in the record is there any evidence to show that the $5,000 was ever turned over to Kraft. In fact, Gerry testified that he never saw the $5,000 exchange hands on August 19, 1973 (Tr. 1015).

The August 19 conversation also reveals that Turcotte and Gerry had agreed that Turcotte would testify falsely before the grand jury. If, as appellants suggest, Gerry in fact acted as the agent for Kraft in the purchase of the horses,

Gerry would have apprised Turcotte of this relationship; yet he had said nothing to Turcotte prior to August 19 about any agency relationships. Additionally, Gerry and Turcotte discussed during the August 19 conversation how each met the other (A. 118. 121). Both Turcotte and Gerry clearly want to get this part of the story straightened out.

The jury was justified in concluding, and the record supports this inference, that both Turcotte and Gerry knew that the horses did not belong to Kraft, and that they agreed to fabricate a story about Gerry acting as an agent for Kraft in order to conceal Gerry's relationship with Turcotte. Turcotte's own statements on August 19, 1973, suggest that if he were called he would tell "them" that he heard a rumor going around that Forrest Gerry acted as the agent (A. 117, 121). Accordingly, the jury could reasonably infer that this story was intended for the FBI and grand jury, and that Turcotte and Gerry conspired to procure Turcotte's testimony before the grand jury.

C. The Evidence Was Sufficient To Support Turcotte's Perjury Conviction Under Count I.

The government must establish that the accused knew that his statements tendered to the grand jury were false.[20/] See United States v. Stone, 429 F.2d 138, 140 (2nd Cir. 1970). Absent an admission by the defendant of the falsity of his statements, the only way that this knowledge can be determined

20/ Turcotte does not challenge the materiality of his testimony before the grand jury.

is through circumstantial evidence. American Communications Ass'n., CIO v. Douds, 339 U.S. 382, 411 (1950); United States v. Sweig, 441 F.2d 114, 117 (2nd Cir. 1971), cert. den., 403 U.S. 932 (1971). The jury may properly consider any circumstantial evidence which establishes the objective falsity itself, proof of a motive to lie, and other facts showing that the defendant knew more than he stated. Sweig, supra, 441 F.2d at 117.

Herein, the perjury count against Turcotte was premised upon Turcotte's answers to the grand jury on September 14, 1973, relative to whether he knew that certain horses he drove belonged to Forrest Gerry (see fn. 3, supra). Turcotte responded in the negative and stated that "... I don't know if there's any truth to it that Forrest Gerry was the agent on these horses that they were bought by him for Kraft Hill Farms ...." (see fn. 3, supra).

David Kraft testified that Turcotte told him on August 19, 1973, that Turcotte agreed to take the horses on a 55-45 percentage; 55% of the winnings going to Turcotte as the trainer-driver and 45% to Forrest Gerry as the owner (Tr. 197). The circumstantial evidence clearly supports this testimony. During the August 19 conversation, Gerry, Turcotte, and Kraft discussed the $10,000 claim check (A. 124). Gerry testified that he never asked for any of the purse winnings or claim money of the two horses (Tr. 946a); however, the tape transcript of August 19, 1973, clearly reflects that Gerry was definitely concerned about getting the claim money

for himself (A. 124). Gerry, in Turcotte's presence, concedes that it would be best for the check to go through a bank rather than having Kraft cash it immediately (A. 124). Gerry then states that it is good enough for him to have the check go through the bank (A. 126). No mention is made of a check for $21,000, the purported price paid by Gerry for the two horses, and it is apparent that the check all parties are referring to is the $10,000 claim check (A. 123-128).

During this August 19 conversation, it is clear that Turcotte and Gerry are fabricating a story. Whether the story was intended for the New Jersey Harness Racing Commission or for the grand jury was an issue for the jury to determine. The two references by Turcotte to possible appearances do not suggest that the story was intended for the Harness Commission; indeed, Turcotte's reference to a possible appearance before a grand jury is clearly warranted (A. 117). Additionally, the testimony of Turcotte at the grand jury on September 14, 1973, a portion of which refers to Turcotte hearing a rumor that Gerry acted as the agent in the purchase of the horses, conforms substantially to a statement of Turcotte on August 19, 1973; a statement which was part of the fabricated story Turcotte and Gerry were discussing (A. 121).

In United States v. Sweig, supra, 441 F.2d at 117, this Court clearly held that the jury may consider any possible motive on the part of the defendant to lie, in resolving whether the defendant falsified his testimony before the grand jury.

Herein, it is unquestioned that the grand jury was investigating the hidden ownership of horses and Gerry's relationship with driver trainers. Additionally, Gerry testified that he knew his name had been mentioned in the grand jury investigation (Tr. 988). The August 19 transcript clearly reveals that Gerry and Turcotte are discussing how each met the other, and this was part of the story which had to be straightened out (A. 121). The jury could reasonably infer that Turcotte and Gerry were fabricating a story which portrayed their relationship as casual in nature, and the entire story on how Gerry acted as the agent in the purchase of the horses bolstered this rendition.

The independent evidence reveals that Turcotte was in total control of the horses. He requested the initial transfers of ownership to be sent to his home in New York; he entered the horses in the claiming races, and he eventually sold the horses. On August 19, 1973, Turcotte and Gerry discuss the claiming money, and Gerry is concerned about getting the check cashed. Both Turcotte and Gerry suggest that Gerry had acted as the agent in the purchase of the horses, and Gerry states that "... you have got to say I was involved as agent for buying them ..." (A. 121).

Under all of these circumstances the evidence was clearly sufficient to support the jury's verdict which found Elden Turcotte guilty of committing perjury before the grand jury.

II.

THE TRIAL COURT DID NOT IMPROPERLY CURTAIL THE CROSS-EXAMINATION OF DAVID KRAFT.

It is axiomatic that the trial court has broad discretion in controlling cross-examination. Alford v. United States, 282 U.S. 687 (1931). Absent an abuse of this discretion, the rulings of the trial court must stand. United States v. Calabrese, 421 F.2d 108 (6th Cir. 1970), cert. den., 397 U.S. 1021 (1970). The record clearly reflects that the trial court did not improperly curtail the cross-examination of Kraft, and indeed provided great latitude to the defense in its cross-examination. We respond seriatim to the four specifications of error alleged by Gerry (Gerry Br. 20-25).

A. Kraft's Efforts To Gain Immunity

The trial court specifically allowed the defense to cross-examine Kraft on whether he had requested immunity (Tr. 438-441). Kraft testified that he did ask for immunity (Tr. 438), and that the government had refused to grant him this request (Tr. 439), and that he requested immunity in prosecutor Meverson's office but did not recall when the request was made (Tr. 440). To suggest that the defense was improperly denied their right to cross-examine Kraft on his request for immunity is unwarranted.

Additionally, the defense desired to question Kraft on whether he ever told Gerry that he was denied immunity. In their offer of proof, the defense sought this testimony to

show that Forrest Gerry, on August 4, 1973, was aware of the denial and, therefore, concluded that Kraft could not be compelled to reappear at the grand jury. The elicitation of this testimony was not designed to challenge the credibility of David Kraft, but to establish that Forrest Gerry knew that Kraft would not reappear at the grand jury. The trial court properly ruled that Gerry could take the stand and testify as to his knowledge, and in fact appellant testified that he did not believe that Kraft would reappear at the grand jury because he was told that once a person is arrested he cannot go back before the grand jury (Tr. 446).

In Alford v. United States, 282 U.S. 687, 694 (1931), the Supreme Court noted that "The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error." Here, the trial court did not unreasonably curtail the cross-examination of Kraft with respect to his request for immunity.

B. Kraft's 1960 Conviction.

In Luck v. United States, 348 F.2d 763, 789 (D.C. Cir. 1964), the court held that the trial court has broad discretion in controlling the cross-examination of the defendant on a prior conviction, and one such factor that the trial court may consider is the age of the conviction. Additionally, in United States v. Owens, 263 F.2d 720 (2nd Cir. 1959), this Court held that the defendant in a criminal case is not

entitled to conduct unlimited cross-examination of an adverse witness. In Owens, the defense sought to question the chief government witness on a recent burglary. The trial court precluded this inquiry. On appeal, this Court noted that the witness had already admitted to three convictions and the admission of this testimony would not damage the credibility of the witness any more than it already had.

Here, David Kraft testified that he had pleaded guilty to sports bribery (Tr. 235-236), and had been convicted of receiving stolen property (Tr. 236). These admissions were brought out on the cross-examination of Kraft immediately prior to inquiry into Kraft's 1960 conviction for assault and battery. Since more than ten years had elapsed since the conviction, the trial court's denial of cross-examination on the 1960 conviction was not an abuse of discretion (Tr. 236-237).[21/]

C. Kraft's Pending Case In New Jersey

The defense sought to establish that Kraft was to receive consideration in a pending New Jersey case, wherein Kraft was charged with receiving stolen property, in exchange

21/ See Rule 609, Federal Rules of Evidence, enacted on January 2, 1975, to become effective on July 1, 1975 (H.R. 5463, 93rd Cong., 2nd Sess.), wherein "Evidence of a conviction under this rules is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

for testifying for the government in the instant case. There is little question but that the defense is entitled to a wide latitude in its cross-examination of an adverse witness with respect to his possible motives and bias in so testifying for the government. See, e.g., United States v. Mahler, 363 F.2d 673 (2nd Cir. 1966); United States v. Marks, 368 F.2d 566 (2nd Cir. 1966), cert. den., 386 U.S. 933 (1967).

Herein, wide latitude was allowed in the cross-examination of Kraft relative to his possible motives and bias for testifying for the government (Tr. 318-320, 322, 331). On cross-examination, Kraft was asked whether the government or any of its agents promised him anything for testifying for the government (Tr. 318). Kraft testified that there had been promises and that "they promised me if I told the truth before the courts, and told everything I knew, they would go before the Judge and tell the Judge that I have been a cooperative witness and ask for leniency in my behalf and that is all I have been promises [sic], sir" (Tr. 319).

Additionally, on cross-examination, Kraft was asked whether he had been promised immunity from income tax evasion (Tr. 322), and Kraft responded in the negative (Tr. 322). Further, Kraft was asked whether any Special United States Attorneys called the New Jersey Racing Commission relative to the restoration of Kraft's son's license to own horses. Kraft testified that he was told that when the trials were over they would inform the Racing Commission that his son knew nothing about Kraft's activities (Tr. 331).

The court disallowed questioning about the pending New Jersey case, but specifically informed counsel that he would allow cross-examination of Kraft about any promises from state or federal authorities in consideration for testifying (Tr. 243). In such circumstances, it cannot be said that the defense was precluded from inquiry into motive and bias.

D. Kraft's Attempt To Be Sentenced Prior To Trial.

Kraft testified that he had not been sentenced on his guilty plea to the sports bribery charge (Tr. 324). When asked whether he had asked to be sentenced prior to the instant trial, Kraft responded that he did not know how to answer that (Tr. 324). Later, in a side bar conference, defense counsel stated that Kraft had made this request (Tr. 357), and counsel suggested that this line of inquiry was probative in establishing whether Kraft was pressured into testifying, arguing that there would have been no pressure on him to testify if he had been sentenced (Tr. 358). The government knew of no such request (Tr. 357).

The court exercised its discretion in disallowing further questioning about the alleged request of Kraft for sentencing, absent a showing of some record document to that effect (Tr. 358). Cf. Gordon v. United States, 344 U.S. 414 (1953). Moreover, we note that the jury could infer from Kraft's testimony that one motive for testifying was anticipated leniency on the sports bribery charge.

III

THE GOVERNMENT'S CROSS-EXAMINATION OF GERRY WAS PROPER.

A defendant ordinarily may not be cross-examined on acts of misconduct not resulting in a conviction of a felony or crime of moral turpitude. See United States v. Provoo, 215 F.2d 531 (2nd Cir. 1959), and United States v. Masino, 275 F.2d 129 (2nd Cir. 1960). Under some circumstances, however, where the defendant has "opened the door," the prosecution may cross-examine the accused concerning such acts of misconduct. United States v. Novick, 124 F.2d 107 (2nd Cir. 1941), cert. den., 315 U.S. 813 (1942).

Further, it is axiomatic that the scope and extent of cross-examination lies within the sound discretion of the trial judge. United States v. Dickens, 417 F.2d 958 (8th Cir. 1969), and United States v. Minuse, 142 F.2d 388 (2nd Cir. 1944), cert. den., 323 U.S. 716. Only where the defendant has been denied his right to be fairly tried will a reversal be warranted. United States v. Tomaiolo, 249 F.2d 683 (2nd Cir. 1957).

The government submits that the trial court's rulings on the government's cross-examination of Gerry, and any errors so committed were harmless in light of the substantial evidence of guilt.

A. The Connie Rogers Testimony.

On cross-examination, the prosecution questioned Gerry on whether he knew who Connie was and whether she had appeared before the grand jury. Gerry responded that

Connie was his girlfriend, that she had been betting the superfectas, and that she had been called by the grand jury (Tr. 985). Gerry then testified, over objection, that Connie had been arrested for cashing tickets under a false name (Tr. 985-986). The trial court sustained an objection to the prosecution's inquiry into whether Gerry knew if she had been convicted (Tr. 988).

The defense concedes that the prosecution properly inquired into Kraft's relationship with Connie to show his awareness of the grand jury proceeding (Gerry Br. 27). The defense argues, however, that the prosecution sought to tarnish Gerry with "guilt by association," and hence prejudice his case. The government submits that the questioning was material to an impeachment of Gerry's credibility.

The thrust of the government's case against Gerry was that he endeavored to obstruct justice by influencing Kraft's testimony relative to the superfecta race-fixing and the hidden ownership of the horses. On direct examination, Gerry testified that he talked with Kraft approximately every day on the telephone about the superfecta case (Tr. 945). Gerry's knowledge of the superfecta case and his knowledge of the attendent consequences flowing from the investigation was probative in establishing his awareness of the investigation and his possible involvement in the activities under consideration by the grand jury. Clearly, such inquiry of Gerry about his girlfriend's grand jury appearance and arrest was

material to whether Gerry had any motive or interest in concealing from the grand jury his involvement with Kraft or Turcotte.

In United States v. Tomaiolo, supra, 249 F.2d 683, this Court held that questioning the defendant on his association with a convict was improper, but that inquiry in itself was insufficient to warrant a reversal. Id. at 688. Herein, the trial court sustained an objection to a question as to whether or not Connie had been convicted. The elicitation of Gerry's knowledge of the arrest was not so prejudicial as to warrant a reversal.

B. The Details Of The Superfecta Case And Gerry's Previous Grand Jury Appearance.

On direct examination Gerry testified that he had talked to Kraft almost every day about the superfecta case (Tr. 945). On cross-examination, Gerry was asked whether he was involved in any race-fixing of the superfectas in 1973, and Gerry responded in the negative (Tr. 979). The defense tendered no objection to this question (Tr. 979). For the defense to suggest now that it was prejudicial error for the prosecution to elicit from Gerry that he bet on the supers and to elicit testimony as to the persons involved and the amounts bet, is unwarranted. Such inquiry was permissible to test the credibility of Gerry on the extent of his involvement with the superfectas and his possible motives for influencing Kraft's testimony relative thereto. Additionally, it is not illegal, nor is it "misconduct" to bet on a harness

race. Even if the defense contends that Gerry's betting arrangement constituted "misconduct," the prosecution could inquire into the details of the betting arrangement on the theory that appellant "opened the door" on direct examination. See United States v. Novick, 124 F.2d 107 (2nd Cir. 1941) cert. den., 315 U.S. 813 (1942).

Similarly, the prosecution purposely inquired into Gerry's appearance in 1966 before a grand jury investigating the fixing of the twin-double races. Prior to Gerry taking the stand, the jury heard a tape of an August 4, 1973, conversation in which Gerry told Kraft that he had trouble with the twin-doubles in the old days, and when he went to the grand jury they "put it to us" (A. 98).

The trial court allowed this line of inquiry over objection (Tr. 990). Even if the court's ruling were erroneous, the error was non-prejudicial in light of the overwhelming evidence of guilt.

The prosecution additionally asked Gerry if he had ever been accused of race-fixing (Tr. 991).[22/] The trial

22/ Appellant cites to United States v. Semensohn, 421 F.2d 1206 (2nd Cir. 1969), wherein this Court held that the prosecution could not cross-examine a defendant on a conviction for which he has not yet been sentenced and for which the time for appeal has not yet expired. 421 F.2d at 1206. Herein, Forrest Gerry was convicted of sports bribery approximately two months prior to this trial. He filed his appeal on July 26, 1974, to the sports bribery charge. While this Court has held that it would be error to question an accused on a conviction which is pending on appeal, it is noteworthy that the prosecution herein was referring to a previous race-fixing situation in 1966, and did not ask if Gerry had been convicted of race-fixing, but merely whether he was accused of race-fixing. In Semensohn, the prosecution asked the defendant: "Now, you were convicted of grand larceny, weren't you?" (footnote cont'd)

court promptly sustained an objection to this question (Tr. 991), and in its charge to the jury the court instructed, on several occasions, that neither appellant was on trial for race-fixing (Tr. 1255, 1258, 1262). In such circumstances, prejudice, if any, accruing to Gerry was not so overwhelming as to impair the jury's fair assessment of Gerry's guilt. Compare United States v. Tomaiolo, supra, 249 F.2d at 687.

IV

THE TRIAL COURT PROPERLY DENIED TURCOTTE'S MOTION TO SEVER.

On July 11, 1974, Turcotte moved to sever his trial from that of Gerry. On July 23, 1974, Judge Platt denied the motion (A. 3). Turcotte argues that he was unduly prejudiced by the denial of this motion, asserting that the evidence tendered relative to the superfecta betting scheme between Kraft and Gerry in no way involved Turcotte. By admitting this evidence, Turcotte argues that his defense was impaired since the jury could not be expected to separate "the proved wrong-doings of Kraft and Gerry relating to the massive superfecta scheme from the similar but distant horse owning scheme ..." (Turcotte Br., pp. 24-25).

It is settled law that the trial judge has broad discretion in determining whether to grant or deny a motion

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421 F.2d at 1207. The court held this to be error, and reversed for a new trial. In Semensohn, this Court relied upon Campbell v. United States, 176 F.2d 45 (D.C. Cir. 1949), which held that the pendency of an appeal prevents the prosecution from proving a previous conviction for impeachment purposes. Herein, the prosecution was precluded from proving a conviction, and in fact, no question was asked of Gerry whether he had been convicted of race-fixing.

to sever pursuant to Rule 14, F. R. Crim. P. Schaeffer v. United States, 362 U.S. 511, 513 (1960); Stilson v. United States, 250 U.S. 583 (1919); United States v. Cassino, 467 F.2d 610 (2nd Cir. 1972), cert. den., 410 U.S. 913 (1973) United States v. Projansky, 465 F.2d 123, 138 (2nd Cir. 1972), cert. den., 409 U.S. 1006 (1972); United States v. Vega, 458 F.2d 1234, 1236 (2nd Cir. 1972), cert. den., 410 U.S. 982 (1973). Only where there is an abuse of this discretion will a reversal be warranted. United States v. Cassino, supra, 467 F.2d at 622.

Herein, the government charged both Turcotte and Gerry with endeavoring to impede and influence the due administration of justice and a single conspiracy to obstruct justice. There were two facets to each of the charges: (1) the concealment of the hidden ownership of the horses; and (2) a concealment of a conspiracy to fix races. At the close of the trial, the court charged that the conversations between Gerry and Kraft held outside the presence of Turcotte, which in essence centered upon the fixing of races or the drivers themselves, could not be used against Turcotte, and if the jury were to find that the charges under Counts II and III were based solely upon a conspiracy to fix races, the jury must then acquit Turcotte (Tr. 1214-1215).[23]

23/ Under Rule 8b, F. R. Crim. P., the initial joinder was proper. See Schaeffer v. United States, supra, 362 U.S. 511 (1960). Once the evidence relating to the superfecta fix was introduced the trial court, if it found undue prejudice resulting therefrom, could have ordered a severance under Rule 14, F. R. Crim. P. The trial court properly found no prejudice. It is noteworthy, however, that the initial motion (footnote cont'd)

Although the trial court concluded that there was insufficient evidence for the jury to connect Turcotte with the second facet of the two counts, this conclusion in no way demonstrates that the court abused its discretion in denying Turcotte's motion to sever and in admitting evidence relating to the fixing of races subject to connection with Turcotte. Moreover, the court explictly charged that with respect to the second and third counts, the jury was to consider against Turcotte only the evidence relating to the hidden ownership of the horses (Tr. 1214-1215).

Additionally, both parts of the second and third counts were not so complicated as to render them beyond the capacity of the jurors to follow. See United States v. Tanner, 471 F.2d 128 (7th Cir. 1972), cert. den., 409 U.S. 949 (1972).

It is clear that where each of appellants was shown to have participated in a common criminal scheme, the fact that each might have had a better chance of acquittal if tried separately is insufficient to justify a severance. United States v. Cassino, supra, 467 F.2d at 622-623. To the contrary, the evidence relative to the superfecta investigation was properly admitted to provide background information on the nature of

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to sever was premised upon the introduction of certain tapes, recorded conversations wherein Turcotte was not present (Tr. 8). After the initial denial of this severance motion (Tr. 8), Turcotte never again moved for a severance or a new trial based upon the introduction of these tapes. Turcotte merely requested that a cautionary instruction be given to the effect that all conversations to which Turcotte was not a party not be held against him. The trial court so complied (Tr. 1214-1215). See Schaeffer v. United States, supra, 362 U.S. at 516.

the grand jury inquiry, and to establish a possible motive for appellants' conduct. United States v. Bradwell, supra, 388 F.2d at 621. Cf. United States v. Braasch, 505 F.2d 139 (7th Cir. 1974).

V

THE TRIAL JUDGE PROPERLY DENIED THE MOTION TO DISMISS COUNT II FOR LACK OF VENUE

Appellant Turcotte argues that the trial court erred in denying his pretrial motion to dismiss Count II of the indictment for failure to allege proper venue. Appellant Turcotte moved to dismiss counts two and three of the indictment on July 11, 1974 (A. 3). Thereafter, on July 15, 1974, Turcotte withdrew this motion:

> MR. CASTELLANO: If your honor please, on behalf of the defendant Eldon Turcotte as to the set of motions I have submitted to the Court, one having to do with the venue, that will be withdrawn completely so that there will not have to be any decision on that motion and it will be deemed not even having been made so the entire issues can be determined in this court whether the venue is proper or not. [Transcript of July 15, 1974, hearing, p. 3] 24/

This appeal arises from the second of two trials. The first trial ended in a mistrial because of the sudden illness of a juror (see transcript of proceedings of March 18, 1974). During the first trial, defense counsel made a motion to

24/ The record has been corrected pursuant to Rule 10e, F. R. App. P., to reflect that the motion was withdrawn (see Addendum to government's brief).

dismiss for lack of venue, the motion tendered subsequent to the commencement of the trial. The motion was denied as untimely. Appellant Turcotte now suggests that the new motion challenging venue was timely since the new trial commenced anew. The government does not quarrel with this statement of the law, United States v. Mischlich, 310 F. Supp. 669 (D.N.J. 1970), affirmed, 445 F.2d 1194 (3rd Cir. 1971), cert. den., 404 U.S. 984 (1971). However, the withdrawal of the motion prior to trial negates any consideration of whether the trial judge erred in denying the motion, since there was no motion for him to rule upon.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I certify that copies of Appellee's Brief were mailed this 21st day of February, 1975, to Appellants' attorneys of record:

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CR 74

CRIMINAL DOCKET

APPENDIX

| DATE | PROCEEDINGS |
|---|---|
| 7-11-74 | Notice of Motion filed, for dismissal of counts 2 and 3; granting deft TURCOTTE a separate trial, etc. (forwarded to Chambers to set ret. date) |
| 7-12-74 | Govts Memorandum filed in opposition to defts motion to dismiss and for separate trial, etc. (Turcotte) |
| 7-15-74 | Before PLATT, J - case called - adjd to July 16, 1974 at 9:45 am for trial. |
| 7-15-74 | Before Platt, J - Motion for dismissal of cts. 2 &3 withdrawn(Turcotte |
| 7-16-74 | Before JUDD,J.- Case adjd to 7-22-74 at 10:00 A.M. for trial |
| 7-22-74 | Govt's trial brief filed |
| 7-23-74 | Before PLATT,J.- Case called- Defts and counsel present- Trial ordered and begun-Deft Turcotte's motion to sever denied- Jurors selected and sworn- Trial contd to 7-24-74 |
| 7-24-74 | Before PLATT, J - case called - defts & counsels present - trial resumed - Trial contd to 7-25-74. |
| 7-25-74 | Before PLATT, J - case called - trial resumed - trial contd to July 29, 1974. |
| 7-29-74 | Before PLATT,J.- Case called- Defts and counsel present- Trial resumed- Trial contd to 7-30-74 |
| 7-30-74 | Before PLATT, J - case called - trial resumed - deft Turcotte moves to dismiss counts 1, 2-3 - motion denied as to each count - deft Gerry motion to dismiss counts 2 & 3 - motion denied as to each count - Trial resumed on July 31, 1974 |
| 7-31-74 | Before Platt, J - case called - trial resumed - Deft Turcotte motion to dismiss counts 1, 2, 3 - motion denied - Deft Gerry motion for Acquittal - motion denied - deft Turcotte motion for a mistrial -motion denied - trial contd to 8-1-74. |
| 8-1-74 | Before PLATT,J.- Case called- Defts and counsel present- Trial resumed Court charges jury- Order of sustenance signed- Trial contd to 8-2-74 at 9:30 A.M. |
| 8-1-74 | By PLATT,J.- Order of sustenance filed |
| 8-2-74 | Before PLATT,J.- Case called- Defts and counsel present- Trial resumed Jury returns with a verdict of guilty on counts 1,2,3 as to deft TURCOTTE and a verdict of guilty on counts 2 and 3 as to deft GERRY- Jury polled Jury discharged- Trial concluded |
| 8-2-74 | By PLATT,J.- Order of sustenance filed |
| 8-2-74 | Stenographers Transcripts dated 7-23-74. 7-24-74, 7-25-74 and 7-29-74 filed (pages 1-729(a) ) |

D. C. 109

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JAMES ORGEL, CLERK
BY [signature] DEPUTY CLERK